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THE duty devolving upon the president, in the appointment of a successor to Justice Miller, is emphasized by the great eminence and reputation of that jurist. The appointment of a judge of the United States Supreme Court is always a great responsibility. But it is especially so, when the member whose death creates the vacancy is a man of distinguished attainments, and who for nearly a generation has been one of the conspicuous ornaments of that court. The report is current that the president will appoint his old law partner and present attorney-general Miller, but we do not believe it. While in no way underrating the ability of that distinguished official, it is certain that his nomination, in view of his limited reputation, would not command general approval. We observe that the name of our distinguished fellow-townsman, Hon. Henry Hitchcock, is again under consideration. We urged his appointment at the time of the last vacancy, and we had reason to know that his name was then seriously considered. He is even better and more favorably known now, at least to the bar of the United States, by his connection with the American Bar Association, of which he was the last year's president. His addresses before that body, and particularly his very learned paper at the judicial centenary recently held in New York have stamped him as a man in every way qualified to be a member of the highest court. We are pleased to see that the *Albany Law Journal* says of him: "Perhaps the president can do as well by naming some other man, but we are certain he can do no better. And no other now occurs to us so well deserving in every point of view, and so entirely unobjectionable."

THIS reminds us that we have failed to make note of the very interesting and scholarly address delivered by Mr. Hitchcock, as president of the American Bar Association, at its late annual meeting in Saratoga. The subject of the address was, "A Year's Legislation," in which he states, in interesting language, the most noteworthy changes in statute law on points of general interest made in the several States and by congress the preceding year. From this address, we note that the larger portion of the State enactments were those in the interest of public safety, health and morals, and which illustrate the exercise of the "police power" so strongly denounced by the extreme disciples of Herbert Spencer, and the constitutional limits and application of which have become burning questions of the day. He reviews also the legislation of the different States upon the subject of liquor, and the various enactments in the interest of ballot reform, and in line with the Australian ballot system.

AN interesting condition of things seems to have arisen in one of the judicial districts of the State of Kansas. It appears that in that district the candidate of the Farmers' Alliance has been elected judge at the recent election, and that, although a citizen of high character and reputation, he is not a lawyer, has never read law and has never been admitted to the bar. These facts have attracted much attention, and apprehensions as to his ability to discharge the duties of the office have been expressed. It appears that so far as the constitution of the State of Kansas is concerned, there is no doubt as to his eligibility. In that respect it is said to be like the constitution of many of the States which does not require that a judge shall be or shall ever have been a lawyer, or even that he shall be learned in the law, though the latter provision will be found in most of the constitutions as a necessary qualification for judges of the supreme court. The improbability that any but a lawyer would be elected to such a position may have seemed, in the minds of the law-making powers, sufficient reason for failing to provide for such a requirement. But the dangers liable to arise from the administration of the law by one not technically conversant with it, are such and so great that a provision of that kind should be inserted in every organic law. Apropos of this Kansas case, the question arises whether, if a layman be elected as a judge of a court, and if by reason of lack of legal information he should be palpably unable to discharge the duties of his office, would he be removable for that reason? In other words, is absolute inca-

pacity, from want of education, to discharge official duties remedial by impeachment? This is a question which, so far as we know, has never arisen, and may not arise, but which would cause abundant discussion if it should.

THE opinion of the Supreme Court of Kansas in State v. White, which will be found in full on page 478 of this issue, is of interest, not so much for what it decides, as for what it condemns. The question at issue was the constitutionality of a statute, peculiar to the State of Kansas, which makes the carnally knowing a female under the age of eighteen, rape, and punishable by at least five years' imprisonment—a cruel punishment, it must be admitted, for the offense, especially when considered in connection with another statute which makes adultery simply a misdemeanor, and punishable only by six months' imprisonment in jail. The court, though conceding the validity and constitutionality of the statute, as being within the power of the legislature, condemn it in no uncertain language. In many of the States there are attempts made to have a similar statute adopted, and this decision, the language of which is more important than the opinion itself, will serve to demonstrate the unwisdom of such legislation, and, in some measure at least, thwart it.

NOTES OF RECENT DECISIONS.

CIVIL RIGHTS — COLORED PERSONS — RESTAURANT ACCOMMODATIONS.— The Supreme Court of Michigan, in Ferguson v. Gies, 46 N. W. Rep. 718, was called upon to interpret the civil rights law of that State, which provides "that all persons within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses." Another section provides that any person who shall violate any of the provisions of the above section, "regardless of color or race," shall be deemed guilty of a misdemeanor. It was held that a restaurant keeper who refuses to serve a colored person with refreshments in a certain part of his restaurant, for no other reason than that he was colored, is civilly liable, though he offers to serve him by setting a table in a more private part of the house. The court says:

The reasoning of Chief Justice Taney in his opinion in the Dred Scott Case is now largely and almost universally regarded as fallacious and contrary to the principles of law then claimed to exist. The emancipation of the slaves followed, and then the fiftheenth amendment placed the colored citizen upon an equal footing in all respects with the white citizen. Since then, in many of the States, laws have been enacted to modify and overcome the prejudices entertained by many of the white race against the colored race, and to place the latter upon an equal footing with the former, with the same rights and privileges. Thus, the legislature of this State in 1885 passed a law with that object and for that purpose; and in certain instances a denial of such rights is made a crime under the law of this State." He further said to the jury that, if they found that the plaintiff was denied full and equal accommodations, the defendant was liable in damages for such denial. So far the learned judge was eminently sound in his reasoning, and correct in his law, but in his application of the law to this particular case he was in error. The jury, under the defendant's own version of the transaction, should have been instructed to find a verdict for the plaintiff.

In his definition of "full and equal accommodations," the court said: "It is claimed by the defendant that he did not refuse to serve the plaintiff, but told him substantially that he would not serve him on that side of the house, but that, if he would go over and take a seat at a table on the other side of the room in the restaurant, he would then serve him in precisely the same manner in which he would be served at the table at which plaintiff had seated himself; and that the rule of the house was not to serve colored persons on that side of the house. Now, gentlemen the defendant would not have the right to refuse to serve the plaintiff in the restraurant proper; but it is claimed by the defendant that the saloon portion is divided from the restaurant, and that the table at which he requested the defendant to sit was in the restaurant. While the defendant had no right to make a rule providing for an unjust discrimination, still he would have the right under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule I will submit to you for determination. Thus, the defendant has the right to reserve certain portions of his business for ladies, and other portions for gentlemen, while he may also reserve other portions for his regular patrons or boarders. He might also, under the law, reserve certain tables for white men, and others where colored men would be served, providing there be no unjust discrimination. And this brings me to an explanation of the term which I have used, viz., 'full and equal accommodations.' By this term 'full and equal' is not meant identical accommodations, but by it is meant substantially the same accommodation. A guest at a restaurant has no more right to insist upon sitting at a particular table than a guest at a hotel has the right to demand a particular room, as long as the accommodations offered are substantially the same. This is all the law demands and requires, and if you find from the evidence in this case that the defendant offered to serve the plaintiff in one part of the restaurant proper in the same manner as guests were served in other parts, and that he offered the plaintiff full and

equal, although not identical, accommodations, and if you find that the rule made by the defendant did not make an unjust discrimination, but was reasonable, then your verdict must be for the defendant." Under this charge, the jury found for the defendant. The fault of this instruction is that it permits a discrimination on account of color alone which cannot be made under the law with any justice. As far as it relates to the right of a restaurant based upon other considerations, the charge is of no concern in this case, and we shall not express any opinion as to its correctness. But in Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction. We have been cited to a large number of cases upholding the doctrine enunciated by the trial judge. It has been held that separate schools may be provided for colored children, if they are reasonably accessible and afford substantially equal educational advantages with those provided for white children. State v. McCann, 21 Ohio St. 198; Bertonneau v. Directors, 3 Woods, 177; Ward v. Flood, 48 Cal. 36, 45; Cory v. Carter, 48 Ind. 327; Roberts v. Boston, 5 Cush. 198; People v. Easton, 13 Abb. Pr. (N. S.) 159; Dallas v. Fosdick, 40 How. Pr. 249; U. S. v. Buntin, 10 Fed. Rep. 730; People v. Gallagher, 93 N. Y. 438. It has also been held that common carriers may provide different cars or separate seats for white and colored persons, if such cars or seats are equal in comfort and safety one with the other. Railway Co. v. Miles, 55 Pa. St. 209; The Sue, 22 Fed. Rep. 843; Logwood v. Railway Co., 23 Fed. Rep. 318; Railway Co. v. Wells, 85 Tenn. 613, 4 S. W. Rep. 5; Murphy v. Railway Co., 23 Fed. Rep. 637, 640; Railway Co. v. Williams 55 Ill. 185. In Day v. Owen, 5 Mich. 520, this same principle was recognized; but it must be remembered that the decision in the case of Roberts v. Boston, 5 Cush. 198, was made in the *ante bellum* days, before the colored man was a citizen, and when, in nearly one-half of the Union, he was but a chattel. It cannot now serve as a precedent. It is but a reminder of the injustice and prejudice of the time in which it was delivered. The negro is now, by the constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship. But this is not all. In 1885 the legislature of this State enacted: "Section 1. That all persons within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens. Sec. 2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed one hundred dollars, or shall be imprisoned not more than thirty days, or both." Section 3 provides that there shall be no discrimination on account of race or color in the selection of grand and petit jurors. The statute exemplifies the changed feeling of our people toward the African race, and places the colored man upon a perfect equality with all others, before the law in this State. Under it no line can be drawn in the streets, public parks or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or conveyances mentioned in this act. See Pub. Acts 1885, pp. 131, 132. But it is claimed by the defendant's counsel that this statute gives no right of action for civil damages; that it is a penal statute; and that the right of the plaintiff under it is confined to a criminal prosecution. The general rule, however, is that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent; nor is it necessary in such a case as this, to declare upon or refer to the statute. The common law as it existed in this State before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the law of this State, was entitled to the same rights and privileges in public places as the white man, and must be treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law, as I understand it to now exist in this State.

Any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this State. The cases which permit in other States the separation of the African and the white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white, and naturally engenders a prejudice against the African, which makes it necessary for the peace and safety of the public that the two races be separated in public places and conveyances. This doctrine which runs through and taints justice in all these cases is perhaps as clearly and ably stated in 55 Pa. St. *supra*, as anywhere. In that case, Judge Agnew says: "If a negro takes his seat beside a white man, or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge in the feeling, human infirmity is not always proof against it. * * * To assert separateness is not to declare inferiority in either. It is not to declare one a slave, and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of divine providence, human authority ought not to compel these widely-separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repul-

sive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate, relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." This reasoning does not commend itself either to the heart or judgment. The negro is here, and brought here by the white man. He must be treated as a freeman or a slave; as a man or a brute. The humane and enlightened judgment of our people has decided—although it cost blood and treasure to so determine—that the negro is a man; a freeman; a citizen; and entitled to equal rights before the law with the white man. This decision was a just one. Because it was divinely ordained that the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed. The law, as I understand it, will never permit a color or misfortune that God has fastened upon a man from his birth to be punished by the law unless the misfortune leads to some contagion or criminal act; nor while he is sane and honest can he have less privileges than his more fortunate brothers. The law is tender, rather than harsh, towards all infirmity; and, if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life.

The prejudice against association in public places with the negro, which does exist, to some extent, in all communities, less now than formerly, is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows—for something that he could not help in the first instance, or ever afterwards removed by the best of life and human conduct. And I should have but little respect or love for the Deity if I could for one moment admit that the color was designed by Him to be forever a badge of inferiority, which would authorize the human law to drive the colored man from public places, or give him less rights than the white man enjoys. Such is not the true theory of either the Divine or human law to be put in practice in a republican form of the government, when the proud boast is that "all men are equal before the law." The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth. The enforcement of the principles of the Michigan civil rights act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal right of all men in public places. This idea of the equality of the races before the law was also shown in the legislation of 1867, relative to the public schools, which declared that "all residents of any district shall have an equal right to attend any school therein." Laws 1867, p. 43. This legislation was construed by this court as an act to prevent the exclusion of colored children from any public schools in the State, although separate schools for the education of blacks and whites might exist, where the accommodations and advantages of learning were fully equal one with the other. People v. Board, 18 Mich. 399. Our holding in the present case is also supported by the following authorities: Coger v. Packet Co., 37 Iowa, 146; Clark v. Directors, 24 Iowa, 266; People v. Board, 101 Ill. 308; Chase v. Stephenson, 71 Ill. 383; Messenger v. State (Neb.), 41 N. W. Rep. 638; Baylies v. Curry, 128 Ill. 287, 21 N. E. Rep. 595; Board v. Tinnon, 26 Kan. 1; Railway Co. v. Green, 86 Pa. St. 421; Donnell v. State, 48 Miss. 680; Decuir v. Benson, 27 La. Ann. 1. See, also, the able dissenting opinion of Danforth, J., in People v. Gallagher, 93 N. Y. at pages 458-466, inclusive.

CONSPIRACY — DAMAGES— CIVIL ACTION— MALICE.—The Supreme Court of New Jersey, in Van Horn v. Van Horn, 20 Atl. Rep. 485, say that an action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damages, that the *gravamen* in a civil action is not the conspiracy but the malice; the former is matter of aggravation or inducement only. Scudder, J., says:

The distinction is now well established that in civil actions the conspiracy is not the *gravamen* of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and enabling him to recover against all as joint tort-feasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement. Pol. Torts, 267; Garing v. Fraser, 76 Me. 37; Hutchins v. Hutchins, 7 Hill, 104; Jones v. Baker, 7 Cow. 445; Parker v. Huntington, 2 Gray, 124. The declaration begins in this form, and is unexceptionable in this particular. It is an action on the case setting forth a malicious conspiracy, or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. No further specification is required than the general terms in which it is pleaded in the declaration.

We have not presented for determination in this pleading the vexed question whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result and did result to the plaintiff. Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333. In the opinion of Mr. Pollock (*ubi supra*), the difficulties in such cases disappear, or are greatly reduced, when the cause of action is considered as belonging to the class in which malice, in the sense of actual ill will, is a necessary element. Here the whole pleading is based on the malicious conduct of the defendants in destroying the plaintiff's credit and patronage, and breaking up her business and means of livelihood. The case is, however, further distinguished from the cases cited above, and separated from the questions of difficulty involved in some of them, because here no breach of contract is alleged. There was no binding contract between the

New York firms and the plaintiff upon which they could be sued for a breach. Where there is a suable contract between a contractor and contractee there is difficulty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach, where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract resulting in damages to him. The plaintiff, Emma D. Van Horn, it is alledged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her it does not appear that she could have any remedy against them. They could send or recall them at pleasure. The complaint here is that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended, by the fraudulent and malicious act of the defendants. If she have no remedy against the defendants, she can have none against others for the wrong which she claims she has suffered. The difference between this action and slander is well stated in Riding v. Smith, 1 Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader carrying on business, founded on an act done by the defendant which led to the loss of trade and custom by the plaintiff. It was maintained on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop. Upon the whole case presented in the declaration, Mogul Steamship Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598, is important to aid in preserving the distinction between injuries caused by mere rivalries in business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice towards him. In the first report Lord Chief Justice Coleridge says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report Lord Justice Fry, after a full statement of cases, says that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. Lord Esher, M. R., dissented. It was decided that the exclusion of the plaintiffs' rival freighters, from participation in a 5 per cent. rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable. The basis of action seems here to be, as stated in the declaration, the fraudulent and malicious acts of the defendants in driving the plaintiff Emma D. Van Horn out of her business; the statements of the means used to effect this purpose all combine to produce a single cause of action, and are not objectionable for duplicity.

RELATIVE DUTIES OF TRAVELER, FLAG OR GATEMAN AT CROSSINGS.

SECTION 1.—*Object of Flag and Gatemen—Division of Subject.*—The principal object in placing flagmen and gatemen at the crossings of railroads and public highways, is to protect those crossing the railroad track at those points; and the protection of passengers and employees on the trains is a matter of secondary consideration. The servants of the railway companies are placed there to warn persons about to cross the tracks of aproaching trains, cars and locomotives, in order that they may not come into contact with them while moving, or may not approach so closely as to frighten horses or animals they are driving, whether drawing vehicles or driven as a herd. The degree of care required of a traveler crossing the track is considerably greater where only a flagman is stationed, than where gates are put in and operated by a gateman; and it is necessary to treat of the two in separate sections.

FLAGMEN.

SEC. 2. *Duty of Traveler to Look for Approaching Trains, Notwithstanding Flagman.*—Because a flagman has been stationed at a crossing, a traveler (using the word to denote one traveling on the highway), is not justified in shutting his eyes, and blindly walking upon the track. Not only has the flagman a duty to perform with reference to travelers, but the latter has a duty to perform that he owes

to himself. Although there may be a flagman at the crossing—even one whom the traveler knows to be vigilant and active in the performance of his duties—yet it is the duty of the traveler to look and listen (if he can, at least), in order to ascertain if a train is approaching, or if approaching to determine if a passage can be safely affected before it reaches the crossing; and if by looking and listening the injury could have been avoided, he cannot recover damages therefor. "The plaintiff," said the New York Court of Appeals, "testified that the 'flagman was always there.' His absence at that time may have been from neglect of duty, or because the company had changed its policy in respect to it. The plaintiff had no right to interpret his absence as an assurance of safety. The rule, as established in this State, requires a traveler to look before he crosses a railroad track for approaching trains, and he is not excused from the charge of negligence if he omits it, and injury results from such omission. He cannot be allowed to say that he was misled by trusting to other appearances, and was thereby excused from using the most obvious and easy means of ascertaining the truth. The existence of the track is a warning of danger. The doctrine stated does not impose upon men a rule of conduct difficult to be understood, or inconsistent with their ordinary habits. It is reasonable that men should be on the look-out for danger under such circumstances, and it is in accordance with experience that prudent men do, before crossing a railway, look and listen for signs of danger." Accordingly, it was held that the evidence of the custom of the company to keep a flagman at the crossing, known to the person injured, and of his absence at the time of the injury, was immaterial and not admissible as proof, where the person injured acknowledged that he had not looked for an approaching train, which he could have seen if he had.[1] Judge Woodruff, of the same court, in an earlier case, after declaring it to be the general duty of a traveler "to use his eyes and ears, so far as there is opportunity," said: "Negligence in the railroad company in the giving of signals, or in omitting precautions of any kind, will not excuse his omission to be diligent in such use of his own means of avoiding danger. And where, by such use of his senses, the traveler might have avoided danger, notwithstanding the neglect to give signal or warning, his omission is concurring negligence, and should be so peremptorily declared by the court; and where proof of this is clear, the plaintiff thus negligent should be nonsuited."[2] The Court of Appeals in New Jersey declared that "the negligence of a flagman will not excuse the traveler who attempts to cross the track of a railroad from looking both ways and listening; he must not rely entirely on the flagman."[3] So in Indiana, where the charge of negligence was in the company removing a flagman from a crossing where it had long kept him, and the person injured knew nothing about it, although he well knew the habit of the company to keep him at the crossing, it was said that "the absence of any signal of an approaching train on the occasion, did not dispense with the necessity on the part of the plaintiffs of using their natural senses and faculties in order to avoid danger, nor relieve them from the exercise of care and prudence commensurate with the danger; but the facts offered to be proved [that the plaintiffs did not observe, just prior to the time of the accident, any person at or near the crossing engaged in giving signals of an approaching train], might well be considered, in connection with the other evidence in the case, in determining whether they did exercise such care and prudence."[4] Likewise, it is held that a driver of a street railway car must "stop, look and listen," and use whatever precautions reasonably in his power to

[1] McGrath v. N. Y. Central, etc. R. R., 59 N. Y. 468, s. c., 7 Amer. Ry. Reps. 107, 17 Am. Rep. 359; reversing 1 Hun, 437, s. c, 3 T. & C. 776.

[2] Ernst v. Hudson River R. R., 39 N. Y. 61, s. c., 36 How. Pr. 84, 100 Am. Dec. 405. On a subsequent appeal of McGrath's case it was held that it was competent to prove that no flagman was present at the crossing, as bearing upon the question whether, under all the circumstances, the company ran and managed its trains with the requisite care and prudence. McGrath v. New York Central, etc. R. R., 63 N. Y. 522. The two decisions in McGrath's case have been summarized as follows: "That, whilst it may have been the habit to have a flagman at the crossing, and that may be shown as bearing on the defendant's negligence, yet the want of one would not excuse a person crossing the road without looking to see whether a train was approaching." Casey v. New York, etc. R. R., 6 Abb. N. C. 104, 126, s. c., 8 Daly, 220, 224; affirmed, 78 N. Y. 518, s. c., 9 N. Y. Wk. Dig. 226.

[3] Berry v. Pennsylvania R. R., 48 N. J. L. 141, s. c., 26 Am. & Eng. R. Cas. 396, 5 Cent. Rep. 111.

[4] Pittsburgh, etc. R. Co. v. Yundt, 78 Ind. 373, s. c., 3 Am. & Eng. R. Cas. 502, 41 Am. Rep. 580.

prevent a collision with a train on the track he is crossing; and he is not excused by the fact that the flagman of the steam railroad company motioned him to come on, or failed to warn him not to come.[5] There are a number of cases requiring the same rule of conduct from the traveler.[6] But where the flagman was absent from his post, buildings and cars prevented the traveler from seeing an approaching train, and noise, his hearing it, no signal was given of the approaching train; and the plaintiff, after observing these facts, went upon the crossing with his team, it was held that the vigilance which the evidence tended to show the plaintiff exercised, was all that would be required of him as a matter of law; that it would not be held as a matter of law that he ought to have stopped his horse and gone forward to look for a train; but this, in connection with the circumstances proved, presented a question of fact for the jury.[7]

SEC. 3. *May not Rely Upon Flagman Exclusively.*—The rule announced in the foregoing quotations has not been universally accepted. This is the case in Illinois, where the doctrine of comparative negligence prevails; but just how far, or whether to any extent, that doctrine modifies the rule announced in the quotation, it is difficult, if not impossible, to state. In speaking on the subject, the supreme court of that State said: "We are aware of expressions by this court, when passing upon the law and fact, and of like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains, was such negligence as would, in the case then under consideration, preclude a recovery. But we are not prepared to say, as a matter of law, that a person approaching a railroad crossing where there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed whose known duty is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track; and the public have a right to rely upon a reasonable performance of that duty." Consequently it was held that if a reasonably prudent and careful man, on approaching a railroad track over a public street, did not do more than observe the absence of the ordinary signal of the flagman, the facts and circumstance ought to be submitted to the jury, to be considered in determining whether, under them, he had exercised ordinary care and caution to avoid the injnry.[8] The same rule was adopted in the federal circuit court for the northern district of Ohio.[9] We do not, however, understand that these cases hold that a traveler may rely upon the flagman when a mere lifting up of the eyes will reveal the danger. A traveler may not play "blindman's buff" upon a railroad crossing.

SEC. 4. *If Traveler Perceives Danger, Must Disobey Flagman's Directions Leading Him Into It.*—If a traveler perceive a danger, but the flagman, not perceiving it, directs him to cross, he may not do so. He cannot dispense with his own sense of vision, nor trust implicitly to another, when the facts before his own eyes show the falsity of the assurance of safety. So, when the traveler sees or hears the danger in time to avoid it, the company is is not chargeable with negligence in failing to blow the whistle, ring the bell, or the flagman's failure to give the signal of danger. "The duty of a flagman," said the New York Court of Appeals, "is to notify travelers crossing the railroad of the approach of trains; and when a traveler knows of the approach of a train, and sees it approaching, as to him the flagman has no duty to perform. The

[5] Philadelphia, etc. R. Co. v. Boyer, 97 Pa. St. 91, s. c., 2 Am. & Eng. R. Cas. 172, 9 W. N. C. 497, 38 L. I. 309. See Wheeler v. New York, etc. R. Co., *post*.

[6] Lake Shore, etc. R Co. v. Franz, 127 Pa. St. 297, s. c., 39 Am. & Eng. R. Cas. 628, 4 L. R. Ann. 389, 18 Atl. Rep. 22, 24 W. N. C. 321. (Injury caused by a second hand-car rapidly following the first. Plaintiff looked for first but not for the second. Gate not down. Recovery allowed.) Greenwood v. Philadelphia, etc. R. Co., 124 Pa. St. 572, s. c., 23 W. N. C. 425, 3 L. R. Ann. 44, 17 Atl. Rep. 188, 10 Am. St. Rep. 614.

[7] Dolan v. President, etc. Co., 71 N. Y. 285, s. c., 5 N. Y. Wk. Dig. 443; Casey v. New York, etc. R. Co., 78 N. Y. 518; affirming 6 Abb. N. C. 104, s. c., 8 Daly, 220. See Kansas Pacific R. Co. v. Richardson, 25 Kan. 391, s. c., 6 Am. & Eng. R. Cas. 96.

[8] Chicago, etc. R. Co. v. Hutchinson, 120 Ill. 587, s. c., 32 Am. & Eng. R. Cas. 82, 11 N. E. Rep. 855, 9 West, 534; Chicago, etc. R. Co. v. Adler, 129 Ill. 335, s. c., 21 N. E. Rep. 846, affirming 28 Ill. App. 102.

[9] Whelan v. New York, etc. R. Co., 38 Fed. Rep. 15. In New York the rule seems to have been adopted in Warner v. New York Central R. Co., 45 Barb. 299; but that decision was reversed in 44 N. Y. 466, s. c., 8 Am. L. Reg. (N. S.) 299, nothing, however, being said in the higher court on this point.

plaintiff's conduct was in no way influenced by the absence of a flagman, as he did not know that one had usually been kept at that point."[10] In such an instance the absence of a flagman is not such a neglect as plaintiff can take advantage of it.[11]

SEC. 5. *Flagman Not Signaling Because He Believes Traveler Sees The Train Approaching.*—A flagman often remains passive when the approaching train is near to the traveler, and plainly in view. In other words, when the traveler has a full and ample opportunity to see and hear the approaching train as the flagman. This often happens to foot travelers. In such instances it may be said that the flagman is justified in believing that the traveler sees the train. It seems to be that the flagman is fully justified in believing that the traveler will not walk into the approaching train; that the instinct of self-preservation will be a sufficient warning to him. The track is always a source of danger, and the traveler is bound to know that fact. He must use both his eyes and ears; he cannot substitute the action of the flagman for the use of those senses. Of course, if the flagman knows that he does not see or hear the train, then he has an active duty to perform; but if such is not the case, why should the flagman be required, when everything leads him to believe that the traveler sees his danger, to assume and perform an act which appears to him and every other intelligent being to be a useless and superfluous act? Certainly, in such an instance, the company is not liable.

SEC. 6. *Flagman at Private Crossings.*—If a company sees fit to impose the duty upon itself to maintain a flagman at a private crossing, it will be liable for the negligence of the flagman, the same as if an express statute or ordinance required it; and if it removes him without notice to those who use such way or crossing, it will be liable to those misled and injured thereby.[12]

SEC. 7. *Failure to Use Flag in Giving Signal of Danger.*—A flagman failed to use his flag in giving the signal of danger from an approaching train, but threw up his hands, and warned the plaintiff not to come. The latter said he did not hear what he said. He did not stop, but slackened his speed and then drove on, and was injured by a train which gave no signal of its approach. It was held that the plaintiff could not recover.[13]

SEC. 8. *General Reputation for Carelessness of Flag or Gateman—Habits of Drinking.*—The general reputation of a flag or gateman for carelessness, in an action for an injury caused by his negligence, cannot be shown.[14] Nor may his intoxication on previous occasion be shown; that fact is immaterial, the material fact being whether his negligence at the time of the accident caused the injury.[15] But why may it not be shown that he was intoxicated at the time of the injury, even though on duty?

SEC. 9. *Gate and Flag Cases Distinguishable From Cases of Neglect to Blow Whistle or Ring Bell.*—Those cases in which the negligence charged was a failure to blow the whistle or ring the bell at a crossing, must be distinguished from those referring to the gatekeeper or flagman. They are essentially unlike. The failure to lower the gate is an assurance that no train is approaching; and so is the failure to give the signal with the flag. It is an affirmative assurance of safety upon which the traveler may possibly act without being charged with negligence. This assurance, however, constitutes the distinctive features of this class of cases, distinguishing them from those cases of mere neglect to blow the whistle or ring the bell. The one allures him into danger, the other does not necessarily. The one is an invitation to cross, the other is not.[16]

GATES.

SEC. 10. *Duty of Gatemen—Effect of Open Gate.*—Whatever may be said with reference to the duty to look for approaching trains at crossings where only flagmen are stationed, it cannot be said that the rule applicable in such instances applies in its full breadth to those crossings where gates are erected and gatekeepers stationed. When down, gates are a

[10] Pakalinsky v. New York Central, etc. R. Co., 82 N. Y. 251, s. c., 2 Am. & Eng. R. Cas. 251, 11 N. Y. Wk. Dig. 73.

[11] Lake Shore, etc. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307.

[12] Sweeny v. Old Colony, etc. R. Co., 10 Allen, 368; Delaware, etc. R. Co. v. Toffey, 38 N. J. L. 525.

[13] Baltimore & Ohio R. Co. v. Hobbs (Md.), 19 Am. & Eng. R. Cas. 337.

[14] Baltimore & Ohio R. Co. v. Colvin, 118 Pa. St. 230, s. c., 32 Am. & Eng. R. Cas. 160, 20 W. N. C. 531, 10 Cent. Rep. 583, 12 Atl. Rep. 337, 18 Cent. L. J. 312.

[15] Warner v. New York Central R. Co., 44 N. Y. 466, s. c., 8 Am. L. Reg. 209, reversing 45 Barb. 299.

[16] Pennsylvania Co. v. Stegemeier, 118 Ind. 305, s. c., 20 N. E. Rep. 843.

warning to every one that a train is approaching; when rased, they stand as an invitation to all travelers to cross; that no train is so near as to render crossing dangerous. "It appears to me," said Lord Cairnes, "that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement and a notice to the public that the line at that time was safe for crossing, and that any person who, under these circumstances, went inside the gates with a view of crossing the line, might very well have been supposed by a jury to have been influenced by the fact that the gate was open."[17] "It is the business of the gatemen," said the Supreme Court of Ohio, "to watch the track, and when clear, to open the gates for persons using the street to cross; and, upon the approach of locomotive or train, to close the gates and prevent persons and vehicles from crossing until the tracks are again clear. To persons in the street who are approaching the railroad tracks with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross."[18] The same rule has been adopted by the federal courts. "At the crossings in a populous city," said Judge Treat, "where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchman, that they can proceed with entire safety. If accidents should happen through the gross negligence of the management of the gates by the watchmen therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of passengers or pedestrians in crossing, under such circumstances, cannot exonerate the railway company whose duty it was to protect said crossing, and give warning as to the safety thereof.[19] But in all such cases it is not enough for the plaintiff to say that he was misled; "he must go further, and show that reasonable persons of ordinary care would have been misled under the same circumstances."[20]

[17] Northeastern R. Co. v. Wanless, 7 L. R. H. L. 12, s. c., 43 L. J. Q. B. 125, 30 L. T. 275, 22 W. R. 56, 9 Moak. 1; affirming 6 L. R. Q. B. 481, s. c., 25 L. T. 103.

[18] Railway Co. v. Schneider, 45 Ohio St. 678, s. c., 14 West. Rep. 538, 17 N. E. Rep. 321.

[19] Central Trust Co. v. Wabash, etc. R. Co., 27 Fed. Rep. 159.

[20] Davey v. London, etc. Ry. Co., 12 Q. B. Div. p. 73, s. c., 53 L. J. Q. B. 58, affirming 11 Q. B. Div. 213, 52 L. J. Q. B. 665, 14 Am. & Eng. R. Cas. 650.

SEC. 11. *Traveler Must Use His Senses of Hearing and Sight at Gates.*—A traveler, however, cannot implicitly rely upon the gate-keeper; he has no right to do so. He may not recklessly omit to use his senses of sight and hearing, and rely entirely upon the presumption that the company is doing its duty through its agent, the gate-keeper. But if the gates are not closed, or if their keepers give no warning of an approaching train, the traveler has a right to presume that none is approaching—not to the extent, however, to dispense with the use of his eyes and ears, such as an ordinarily prudent man would not do. Following this line of reasoning, it was decided that if a traveler enters upon the tracks when the gates are raised, and is immediately confronted by two trains passing in opposite directions, and in the confusion caused by the unexpected danger into which he is thus led, is struck and killed, the company is liable.[21] But whether the traveler is justified in exercising less vigilance, because he relied upon the gate-keeper, is a question for the jury.[22]

SEC. 12. *Negligence of Gatemen is Negligence of Company—Failure to Signal Approach of Train.*—The gateman is the agent of the railway company, and his negligence in the performance of his duty is the negligence of the company. It is responsible for his lack of vigilance. If, therefore, he fails to manage the gates properly, and thereby a traveler is injured, the company is liable, if such traveler did not contribute to the injury. Examples are, however, better than anything we can say. At ten o'clock on a starlight night, a team with three persons in the open wagon drawn by it slowly approached a railroad crossing where the gates were open. Houses obstructed the view. The travelers heard, when 350 feet from the crossing, a bell ring and whistle blow, but they could not tell, from the sound of the whistle whether the train was approaching on the road they intended to cross, or on another one near by. The team moved on without stopping, and almost immediately, on reaching the track, a collision occurred whereby one of the three was killed.

[21] Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 20 N. E. Rep. 843; State v. Boston & Maine R. Co., 80 Me. 430, s. c., 35 Am. & Eng. R. Cas. 356, 38 Abb. E. Jr. 269; Feeney v. Long Island R. Co., 116 N. Y. 375, s. c., 39 Am. & Eng. R. Cas. 639, 22 N. E. Rep. 402, 26 N. Y. St. Rep. 729.

[22] Callaghan v. Delaware, etc. R. Co., 52 Hun, 276, 5 N. Y. Sup. 285, 2 N. Y. St. Rep. 594.

The train was running faster than the statute permitted at a crossing in a city, where the collision occurred. In the trial brought against the company for damages, it was stipulated that judgment should be entered for the State, if the facts were such as authorized a jury to return a verdict for it; and it was held that a jury would have been warranted in finding that the travelers looked and listened after hearing the whistle—that there was evidence of negligence on the part of the company in running the train at a greater rate than allowed by the statute, and in leaving the gate open, thus inviting persons to cross. The State had the judgment. "While a neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him," said the court, "still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended (the gate-keepers had gone home for the night) by a flagman, then these persons had a right to accept the fact as some evidence that the trains would not attempt to pass the crossing at a faster speed than six miles an hour. Of course, full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them; because experience teaches us that it would not be practicable to do so. But such expectation has some weight in the calculation of chances, greater or less, according to the circumstances." "If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagmen and open gates must be evidence that a train is not presently due or expected."[23] So a traveler, approaching the gates, saw them raised by the gate-keeper—saw him go into the gate-house. At the cross-walk, thirty feet before reaching the track, he looked and saw no train. His view there was somewhat obstructed. He did not look again, though the view for the remaining thirty feet to the track was entirely unobstructed; and if he had looked, he would have seen the train before driving upon the track. He was struck by an approaching train; and the verdict was allowed to stand, his negligence being a question for the jury.[24] Seventy-three feet before reaching the track, where the gate was raised, at night, the deceased was seen to look both ways for an approaching train. An engine was backing slowly towards the crossing, with no light before it. A nonsuit being entered, upon appeal the case was reversed, the court holding that the question of contributory negligence was one for the jury.[25]

[23] State v. Boston & Maine R. Co., 80 Me. 430, s. c., 25 Am. & Eng. R. Cas. 356, 38 Abb. L. J. 269.

[24] Glushing v. Sharp, 96 N. Y. 676, s. c., 19 Am. & Eng. R. Cas. 372.

[25] Lindeman v. New York Central, etc. R. Co., 42 Hun, 306.

[TO BE CONTINUED.]

CONSTITUTIONAL LAW — STATUTE — CRIMES AND PUNISHMENTS—RAPE.

STATE OF KANSAS V. WHITE.

(Supreme Court of Kansas, Nov. 8, 1890.)

1. *Constitutional Law — Statute — Rape.*— The amendment to section 31 of the act relating to crimes and punishments, as enacted in 1887, which provides for the punishment of any male person having illicit sexual intercourse with any female person under eighteen years of age, by confinement and hard labor for not less than five years, nor more than twenty-one years, is not unconstitutional or void.

2. *Criminal Practice—Rape—Information.*—In such a case, where the information charges, among other things, that that the defendant, Charles W. White, did "commit the crime of rape, by then and there unlawfully, feloniously and carnally knowing one Lottie Linden," etc., "contrary to the form of the statute," etc., the information is not insufficient for the reason that it does not allege that Lottie Linden was not the wife of Charles W. White.

VALENTINE, J.: This is an appeal from a judgment rendered in the district court of Norton county, sentencing the defendant, Charles W. White, to imprisonment in the penitentiary for the period of five years for the commission of an alleged rape "by carnally and unlawfully knowing" Lottie Linden in violation of the provisions of section 31 of the act relating to crimes and punishments as amended in 1887. Laws of 1887, chapter 150, section 1. Gen. Stat. of 1889, paragraph 2152. This section reads as follows:

"Sec. 31. Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female under the age of eighteen years, or by forcibly ravishing any woman of the age of eighteen years or upwards, shall be punished by confinement and hard labor not less than five years, nor more than twenty-one years."

This section of the statute is now precisely the same as it was prior to the amendment of 1887,

except that where the word "eighteen" now occurs in the amended section, the word "ten" occurred in the original section, and between the words "female" and "under" in the amended section, the word "child" occurred in the original section.

It is unquestionably true that in 1887, and before and since, our laws relating to illicit intercourse between the sexes and for the punishment thereof, and for the protection of boys and girls and others and of society generally, greatly needed and still need amendment, but the amendment that was in fact made in 1887, may be subject to considerable criticism. It denominates certain conduct rape, which is not in fact rape, and could not in the nature of things be such, unless the meaning of the word "rape" should be greatly changed. It attempts to accomplish a thing by the use of indirect language which might be much better accomplished by the use of direct language. It inflicts a punishment for mere fornication of vastly greater severity than was ever before inflicted for such a wrong and much greater than the punishment imposed for the greater wrong of adultery or of sexual intercourse coupled with seduction where the female is over eighteen years of age. In attempting to provide for the protection of girls, it wholly overlooks the protection of boys. It overlooks the fact that some girls under the age of eighteen years are incorrigibly wicked and depraved, even common prostitutes. It overlooks the fact that girls generally, whether good or bad, have intelligence and the capacity to think, to will and to act, long before they arrive at the age of eighteen years. It in effect presupposes that boys of the same age with girls, or even much younger than girls, are vastly their superior in mental capacity and in the power to exercise volition. It recognizes a greater difference between the sexes and a greater superiority on the part of the males over the females than has ever before been promulgated or admitted or believed by any person or set of persons, although it has generally been maintained that there always have been sufficient differences existing between the sexes to justify all the great differences in the powers, privileges, disabilities and immunities which by virtue of the laws have heretofore existed between the sexes.

The defendant in the present case was a boy nineteen years of age, and the female with whom he had the sexual intercourse was a girl sixteen years of age. Each lacked just two years of having arrived at the age of maturity. Their sexual intercourse with each other was had at divers times from April 15, 1889, up to May 25, 1889. Also from the record brought to this court it would seem that the girl had also had improper relations with other male persons besides the defendant. On February 12, 1890, the girl gave birth to a child, of which she testified that the defendant was the father. It also seems that with regard to the intercourse between these parties, no conjugal right was violated, no force or fraud or seduction or promise of marriage has been imputed; they were not of kin to each other; both willingly participated in the wrongful acts; both in fact consented and each had ample capacity to know what he or she was doing and to consent; and none of the improper acts committed by them, whether of sexual intercourse or otherwise, were committed in public or in the presence of others. Indeed, except for the foregoing statute, their acts would constitute nothing more than pure and simple fornication.

It is claimed, on the part of the defendant, that the foregoing statute either can have no application to this case, or, so far as it does apply to this case, it is unconstitutional and void for the reason that it conflicts with section 9 of the bill of rights, because it inflicts cruel and unusual punishment; and is in conflict with the spirit of the bill rights generally; and is in violation of common sense, common reason and common justice: and the following authorities are cited in support of this claim: Anderson v. The City of Wellington, 40 Kas., 173; 3 American and English Encyclopædia of Law, 674, note 3 and cases there cited; Potter's Dwarris on Statutes and Constitutions, 76, 77, and 78.

It is claimed that the legislature cannot convert pure and simple fornication into rape or provide a punishment for the same as though it were rape.

The statutes of this State, relating to illicit intercourse between the sexes, when such statutes are compared with each other are peculiar. Under them, sexual intercourse between unmarried persons where no extraneous facts exist to magnify the wrong, is never, as to the female, an offense, and is never, as to the male, an offense, unless the female is under eighteen years of age. And where the intercourse is procured under a promise of marriage, it is never an offense with regard to the female and is only an offense with regard to the male where the female is under twenty-one years of age, and it is not then an offense with regard to the male, unless the female is either under eighteen years of age, or is both under the age of twenty-one years and of good repute. General Statutes of 1889, paragraphs 2157, 2152. And even where conjugal rights are violated, as in adultery, or where the sexual intercourse is coupled with acts of an openly lewd, lascivious or indecent character, the acts of the parties constitute only a comparatively insignificant case of misdemeanor. The statute on this subject reads as follows:

"Sec. 232. Every person who shall be guilty of adultery and every man woman (one or both of whom are married, and not to each other), who shall lewdly and lasciviously abide and cohabit with each other, and every person married or unmarried, who shall be guilty of open, gross lewdness, or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor and punished by

imprisonment in a county jail not exceeding six months, or by fine, not exceeding five hundred dollars, or by both such fine and imprisonment." Act relating to crimes and punishments, section 232. General Statutes of 1889, paragraph 2369.

Now why should adultery, where conjugal rights are violated and where the parties are of mature age, be only a trivial misdemeanor, while fornication pure and simple between boys and girls should be a high felony as to the boy? Lord Macaulay, in his history of England, vol. 1 ch. 2, in speaking of the Puritans, who were probably the most austerely moral and religious people that ever existed, while they were in power in the time of Cromwell, says: "Against the lighter vices, the ruling faction waged war with a zeal little tempered by humanity, or by common sense. * * * The illicit intercourse of the sexes, even where neither violence nor seduction was imputed, where no public scandal was given, where no conjugal right was violated, was made a misdemeanor."

In this State, instead of making the acts of which Lord Macaulay makes mention, a misdemeanor only, they are, if the female is under eighteen years of age, made a high crime and a felony as to the male, for which he may be imprisoned in the penitentiary at hard labor for a period of twenty-one years. From the earliest times in Kansas it has been the tendency of legislation and of thought to consider female persons as having some intelligence, some mental capacity and some power of volition and to make them as nearly equal with males, with regard to their lives, liberties, persons, property, vocations, rights, powers, privileges and immunities as it is possible to make them. Under the laws as they now exist they are as much entitled to their children as males, and may carry on business as freely as males, and the elective franchise has been greatly extended to them, and yet the statute which we are now considering inaugurates a theory of vast inequality between them. Under this statute, a boy and girl, both under the age of eighteen years and of the same age, or the boy the younger, may engage in an act for the doing of which the boy may be imprisoned at hard labor in the penitentiary for twenty-one years, while the girl has committed no offense, and this for the reason that in contemplation of law she has no mental capacity to consent to the act, no intellectual volition. It is true she may be the older of the two, the more intelligent and aggressive of the two, the real actor in the transaction and the seducer, if either is a seducer, and yet under the law she has no mental capacity to consent, or will power to act, and therefore has not committed any offense, not even a misdemeanor, while the boy has committed a great crime, and if he is over sixteen years of age may be sent to the penitentiary and be there confined at hard labor for twenty-one years as aforesaid; but if he is under sixteen years of age he would be confined in the county jail only, or be sent to the State Reform School. And it would make no difference that the girl might be a common prostitute, his punishment would be the same. Now, if it is necessary that such a severe punishment should be inflicted upon a boy for pure and simple fornication, it would seem that some slight degree of punishment might properly be inflicted upon the girl; and if it is necessary that such a severe punishment should be inflicted upon either, it would seem that some slight degree of punishment might properly be inflicted upon any person, male or female, guilty of illicit sexual intercourse, although the same might be only fornication and the female be over eighteen or over twenty-one years of age; and if such a severe punishment may properly be inflicted upon any person for pure and simple fornication, it would seem that the greatest of punishments would not be too severe for any person of full age who should commit the greater wrong of adultery or of sexual intercourse, coupled with seduction.

We agree with counsel for the defendant that "it is not competent for the legislature to make that rape which in the very nature of things and common justice and sense is not," but courts, in constructing statutes, do not look at mere forms or phrases, or even at the improper use of language, but they look at the substance of things and try to ascertain what was the real intention of the legislature; and evidently the legislature in passing the foregoing statute, intended that in all cases of illicit intercourse, where the female is under eighteen years of age, the male should be punished by imprisonment at hard labor in the penitentiary for a period of not more than twenty-one years, not less than five years although the act might be pure and simple fornication and nothing else. Instead of enacting this, however, in direct terms, the legislature chose to accomplish the same result in an indirect manner and by amending that section of the act relating to crimes and punishments, to-wit: section 31, which relates to rape. When this section was first enacted in the early days of Kansas, it was evidently believed by the legislature that the girls of Kansas then had the capacity to give their consent to sexual intercourse at the age of ten years, and that they had not such capacity at any earlier age, and hence the age of ten years was fixed as the age of consent; but when the section was amended in 1887, so as to make it read as it now reads, it would seem that the law makers believed that the girls of Kansas, at that time, had no capacity to give any intelligent consent to sexual intercourse until they arrive at the age of eighteen years. In substance, however, the law makers simply intended to punish any male person by imprisonment in the penitentiary at hard labor for a term not exceeding twenty-one years, who might be guilty of any kind of illicit sexual intercourse with any girl under eighteen years of age, whether she consented or not and whatever might be the surrounding circumstances, and although intercourse might be pure and simple fornication,

with respect to the severity of the punisment, while we think it is true that it is a severer one than has ever before been provided for in any other State or country for such an offense, yet we cannot say that the statute is void for that reason. Imprisonment in the penitentiary at hard labor is not of itself a cruel or unusual punishment within the meaning of section 9 of the bill of rights of the constitution, for it is a kind of punishment which has been resorted to ever since Kansas has had any existence and is a kind of punishment common in all civilized countries. That section of the constitution probably, however, relates to the kind of punishment to be inflicted and not to its duration. Although the punishment in this case may be considered severe and much severer indeed than the punishment for offenses of much greater magnitude, as adultery, or sexual intercourse coupled with seduction, yet we cannot say that the act providing for it is unconstitutional or void.

It is also claimed on the part of the defendant that the information does not charge a public offense; and this for the reason that it does not charge that the prosecutrix, Lottie Linden, was not the wife of the defendant. Now, while it does not in terms charge any such things, yet it does so by the clearest of implications. It charges as follows: "That on or about the 21st day of May, A. D. 1889, in said county of Norton and State of Kansas, one Charles W. White did then and there unlawfully, feloniously and carnally knowing one Lottie Linden she the said Lottie Linden then and there being a female under the age of eighteen years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas."

Now if Lottie Linden had been the wife of the defendant, Charles W. White, her name would have been White; and the intercourse charged would not have been a "crime" or "rape" not committed "unlawfully and feloniously" as charged, and other matters are also charged which could not have been true if Lottie Linden had been the wife of the defendant. The charge is for constructive rape and is stated substantially in the language of the statute, and in a prosecution for rape it was never necessary to state that the person ravished was not the wife of the defendant.

It is further claimed, on the part of the defendant, that the court below erred in sustaining a demurrer by the State to a portion of the defendant's plea in abatement. The prosecution was upon an information filed by the county attorney and the offense charged therein was and is a felony. The second paragraph of the plea in abatement reads as follows: "Defendant says that at the date of filing the information in this cause he was not a fugitive from the justice of the State of Kansas, nor had he been at any time such fugitive. Defendant further says that no preliminary examination has ever at any time been given him in this action, nor did he at any time waive such preliminary examination."

The State demurred to this paragraph of the plea in abatement upon the ground that it did not state facts sufficient to entitle the defendant to a hearing thereon; and the court below sustained the demurrer. It seems to be understood, however, that the demurrer was sustained only as to the first sentence of the second paragraph, but whether it was sustained only as to the first sentence of the paragraph, or as to the whole of the same, we think the ruling, was and is erroneous. It was necessary that the whole of the paragraph should be true, in order to entitle the defendant to have the action abated. It was necessary for the abatement of the action that he should not have been a fugitive from justice, that he should not have had a preliminary examination and that he should not have waived the same; and striking out the first sentence of the paragraph, which alleged that he was not a fugitive from justice, rendered the whole of the paragraph insufficient and the entire plea in abatement insufficient. The striking out of the first sentence of the second paragraph of the plea was as fatal to the sufficiency of the plea as the striking out of whole of the plea would have been. Section 69 of the Criminal Code, so far as it is necessary to quote it, reads as follows: "Sec. 69. No information shall be filed against any person, for any felony until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: provided, however, that informations may be filed without such examination against fugitives from justice and in misdemeanor cases not cognizable before justice of the peace."

This is sufficiently clear without further comment. For the error of the court below in sustaining the aforesaid demurrer, the judgment of the court below will be reversed and cause remanded for a new trial. All the justices concurring.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATORS' SALE OF LAND.—An unconfirmed orphans' court sale by the administrator of the intestate's realty to pay his debts does not divest the title of the heirs who may maintain ejectment for the land.—*Greenough v. Small*, Penn., 20 Atl. Rep. 553.

2. ADVERSE POSSESSION.—Where a cemetery company, organized in perpetuity, takes possession of land under a deed of warranty, of the whole title, though in fact there was an outstanding undivided interest in another person, and follows this up by inclosing the land, and devoting it to the burial of the dead, this is such possession as will constitute an ouster of the owner of such undivided interest.—*Baker v. Oakwood*, N. Y., 25 N. E. Rep. 312.

3. ADVERSE POSSESSION—Effect.—An actual, open, notorious, exclusive, and continuous possession of land for 20 years, by one claiming to own the same in fee-simple, and who supposed that he had the title by grant, is effectual to confer title.—*Brown v. Morgan*, Minn., 46 N. W. Rep. 913.

4. APPEALABLE ORDERS.—An order of the district court refusing an application for judgment upon the findings of a jury is not an appealable order, within the meaning of subdivision 1, § 5236, Comp. Laws 1887, which subdivision is as follows: "An order affecting a substantial right, made in any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken." Such an order neither determines an action nor any issue in an action, nor is it the legal effect of such an order to prevent the entry of a judgment from which an appeal might be taken.—*Persons v. Simons*, N. Dak., 46 N. W. Rep. 969.

5. APPEAL-BOND.—Where, by mutual agreement of the parties, an appeal bond is executed by a different surety than the one approved by the court, the obligors in the bond cannot avail themselves of the objection that the bond was not signed by the surety approved by the court, the transcript having been sent up, and execution stayed in all respects as if the bond had been regular.—*Buchanan v. Milligan*, Ind., 25 N. E. Rep. 349.

6. ATTACHMENT—Damages.—A merchant whose real estate has been attached by a creditor for a debt actually due cannot recover actual damages as for a wrongful attachment, upon the ground that he was thereby prevented from selling the property, and applying the proceeds to the payment of his debts.—*Traweek v. Martin-Brown Co.*, Tex., 14 S. W. Rep. 564.

7. ATTACHMENT—Evidence.—On the trial of this action, brought by the defendant in an attachment suit for the value of property claimed by such party as additional exemptions, under the statute, against the sheriff, while such property was held by him under his warrant of attachment, and under an order of the court made on a motion to discharge the attachment, denying the same on the ground, among others, that the debt for which the attachment was issued was incurred for property obtained under false pretenses, said order was admitted in evidence as a bar to the action: *Held*, that the court committed no error in so admitting said order, and holding it a bar to the action. *Hall v. Harris*, S. Dak., 46 N. W. Rep. 931.

8. ATTACHMENT OF HOMESTEAD.—A levy of an attachment on land, in which the debtor has a homestead, is a nullity as to the 200 acres including the residence, and no lien is created except on the excess.—*Meyer v. Paxton*, Tex., 14 S. W. Rep. 568.

9. ATTORNEY'S FEES—Contract by Receiver.—The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency: *Held*, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim.—*Barrett v. Henrietta Nat. Bank*, Tex., 14 S. W. Rep. 569.

10. BANKS AND BANKING—Collections.—The drawers of a draft deposited with a bank for collection, and by it forwarded to a correspondent bank, which collects it and credits the proceeds to the forwarding bank, are entitled to recover the amount from the collecting bank (it being still in the hands of that bank) as against the receiver of the forwarding bank, which was insolvent, and known to be so by its officers, when it received the draft, and suspended payment before the proceeds were withdrawn from the collecting bank.—*Importers' and Traders' Bank v. Peters*, N. Y., 25 N. E. Rep. 319.

11. BOUNDARIES—Commissioners.—Under Acts 15th Gen. Assem. Iowa, ch. 8, permitting a commissioner to be appointed by the district court to survey and establish disputed boundaries between parties, it is competent for the court to appoint such a commissioner on plaintiff's aplication, even though defendant claims title by prescription up to the line claimed by him; for, if defendants' claim is sustained by the evidence taken before the commissioner, that will terminate the investigation.—*Plank v. Reinhart*, Iowa, 46 N. W. Rep. 1005.

12. CHATTEL MORTGAGES—Description.—The mortgagee of cattle included in a chattel mortgage, covering all the property of the mortgagor and describing it by the locality in which it is to be found, is entitled to their possession as against a subsequent pledgee of the same cattle, claiming under an instrument by which the mortgagor simply conveys all his interest in them.—*Parker v. Farmers' L. & T. Co.*, Iowa, 46 N. W. Rep. 1004.

13. CHATTEL MORTGAGES—Right of Mortgagee.—A mortgagee entitled to the possession of personal property covered by his mortgage may maintain trover against a third party, who has converted the same, without first obtaining a judgment against the mortgagor, and without making him a party to the action.—*Howard v. Burns*, Kan., 24 Pac. Rep. 981.

14. CORPORATIONS—Stockholder.—The rule that a stockholder cannot, ordinarily, maintain an action upon a cause of action accruing to the corporation, or for a wrong done to it, applied.—*Mealey v. Nickerson*, Minn., 46 N. W. Rep. 911.

15. CORPORATIONS—Ultra Vires.—Under Laws N. Y. 1871, ch. 481, permitting a corporation to secure debts by a mortgage of any or all of its real estate, a mortgage executed to secure a pre-existing indebtedness due from the corporation is valid, and the fact that the notes representing the indebtedness were executed after the mortgage is of no consequence as long as the indebtedness though in another form existed prior to the execution of the mortgage, or was created simultaneously therewith.—*Martin v. Niagara Falls Paper Manuf'g Co.*, N. Y., 25 N. E. Rep. 303.

16. CONSTITUTIONAL LAW—Interstate Commerce.—Act Pa. April 8, 1861 (P. L. 258), punishing the buying without a license of certain articles of produce in Berks and Franklin counties "with intent to send the same for sale or barter to any other market out of said counties" is not in violation of the interstate commerce clauses of the constitution, the license fee, at most, being only a tax on the articles before they begin to move as an article of trade from one State to another.—*Rothermels v. Meyerle*, Penn., 20 Atl. Rep. 583.

17. CONSTITUTIONAL LAW—Titles of Laws.—Section 27, ch. 23, Laws N. Dak. 1890, entitled "An act to provide for the organization and government of State banks," which prohibits all persons from doing a banking business in this State, except corporations which are organized under said chapter, examined and held to be constitutional. Said section does not contravene either

section 1 of article 1 of the State constitution or section 1 of the fourteenth amendment to the federal constitution.—*State v. Woodmansee*, N. Dak., 46 N. W. Rep. 970.

18. CONTRACTS—Waiver.—A payment made by railroad contractors to their subcontractors on the final estimate of a subordinate engineer of the railroad company is not a waiver by the contractors of a contract provision that the amount due the subcontractors shall be paid them only on the certificate of the railroad company's chief engineer as to the quantity of work performed by them; and the subcontractors cannot maintain an action against the contractors for an alleged deficiency due them on their work without first procuring such certificate.—*McNamara v Harrison*, Iowa, 46 N. W. Rep. 976.

19. CONTRACT TO MAKE WILL.—A contract made in a will under which immediate possession of land is to be given to the devisee on condition that he take testatrix to live with him, and support her as one of his own family, cannot be rescinded, after possession has been given and expenditure made on the faith of it, for slight annoyances suffered by testatrix in devisee's family.—*Tuit v. Smith*, Penn., 20 Atl. Rep. 579.

20. COVENANT—Measure of Damages.—When a deed passes an estate of value, though not that covenanted, it is to be considered in measuring the damages for a breach of the covenants for title, followed.—*Huntsman v. Hendricks*, Minn., 46 N. W. Rep. 910.

21. CRIMINAL LAW—Assault with Intent to Kill.—On trial for assault with intent to kill, it appeared that defendant had just been married, and that the young men of the neighborhood threatened to give him a *charivari* unless he gave them money to spend for refreshments. This defendant declined to do, and the crowd came on his premises for three successive nights, making great noises, and frightening defendant's wife. On the third night, defendant fired into the crowd, and injured one of them: *Held*, that it was inadmissible for the State to prove that it was customary in that neighborhood to give a newly-married couple a *charivari* unless there had been a public wedding to which all the neighborhood had been invited.—*Minaghan v. State*, Wis., 46 N. W. Rep. 894.

22. CRIMINAL LAW—Murder.—Where a defendant indicted for murder is convicted of manslaughter, the admission of evidence tending to show that the killing was the result of conspiracy could not have prejudiced him, since the verdict is contrary to the theory that there was such a conspiracy.—*State v. Row*, Iowa, 46 N. W. Rep. 872.

23. CRIMINAL PRACTICE—Barn Burning.—Under Gen. St. Ky. ch. 29, art. 7, § 3, providing for the punishment of any person who shall willfully and unlawfully burn a barn where wheat, corn or other grain is usually kept, an indictment is sufficient which charges that defendant did unlawfully, willfully, etc., set fire to, burn and destroy the barn of a certain person in which corn and oats were usually kept, and were then stored.—*De Shazer v. Commonwealth*, Ky., 14 S. W. Rep. 542.

24. CRIMINAL PRACTICE—Burglary.—Under Pen. Code Cal. § 459, making the entering of certain premises "with intent to commit grand or petit larceny, or any felony," burglary, as there is no other degree of larceny, it is not necessary that the information charge the degree of larceny with intent to commit which defendant entered the premises.—*People v. Smith*, Cal., 24 Pac. Rep. 988.

25. DEATH BY WRONGFUL ACT.—Under Rev. St. Wis. § 4256, the jury, in an action by children for the negligent killing of their mother, may take into consideration the number of years the mother would probably have lived had it not been for the injury, the reasonable expectation of the amount of her property being increased during that time, and the reasonable expectation of pecuniary benefit to the children, by way of support or otherwise, had decedent continued to live without such injury; and these elements of damage are not affected by the fact that the children are all of full age.—*Tuteur v. Chicago & N. W. R. Co.*, Wis., 46 N. W. Rep. 897.

26. DEATH BY WRONGFUL ACT—Damages.—Under Gen. St. Ky. ch. 57, § 3, which gives a right of action to the personal representative of a person whose life was lost by the willful neglect of other persons or corporations, their agents or servants, the personal representative of a railroad employee cannot recover from the company for the employee's pain and suffering during the time intervening between the infliction of the injury and the death resulting therefrom, unless such injury was the result of gross or willful neglect on the part of the company or its servants.—*Louisville & N. R. Co. v. Coniff's Adm'r*, Ky., 14 S. W. Rep. 543.

27. DESCENT AND DISTRIBUTION—Action by Heirs.—A complaint in an action by one of the heirs of a decedent to recover a debt due the estate is fatally defective where it fails to allege that no letters of administration had been granted upon the estate, even though it does allege that deceased died intestate leaving no widow, and that all debts due from the estate had been paid.—*Finnegan v. Finnegan*, Ind., 25 N. E. Rep. 341.

28. DIVORCE—Custody of Children.—A husband and wife, living in Aurora, Ill., having a child which was a minor, were divorced, there being no provision in the decree for the custody of such child. Afterwards the parties agreed that the mother should retain the custody of such infant, the father to pay five dollars per week for its support. This he did for some time, when the mother removed to Omaha, bringing the infant with her. In a proceeding on *habeas corpus* by the father to obtain the custody of the child, *held*, that he had no absolute vested right in the custody of such infant, and that the paramount consideration is, what is really demanded by the child's best interests, and the court in awarding the custody to the father, mother, or other person, will be guided by what may seem best for the child.—*Giles v. Giles*, Neb., 46 N. W. Rep. 916.

29. EASEMENT—Injunction.—The owner of a lot on which he intended to build agreed with plaintiff, who owned the adjoining lot, to construct a stairway on his lot, "with a hall on the second floor running to rear end of the building, with door in said rear end of hall," for the joint use of plaintiff and himself, plaintiff agreeing to build a party-wall 100 feet in length. He made his building 100 feet deep, with a hall the entire distance. In addition to the front stairs named in the agreement, he also built back stairs connecting with said door, and these were used jointly by the tenants of plaintiff and himself. He afterwards built an addition to his building in the rear: *Held*, that he must extend the hall through such addition, with a door and back stairs as before.—*Price v. Baldauf*, Iowa, 46 N. W. Rep. 983.

30. EJECTMENT—Equitable Defenses.—A vendee who is in possession of land under a title-bond, but who has failed to pay the price, cannot be ejected in an action at law, since he is the equitable owner of the land, and under his bond for title must be treated as the holder of the fee subject to the vendor's lien.—*Morton v. Dickson*, Ky., 14 S. W. Rep. 531.

31. EJECTMENT—Parties.—After judgment is rendered in ejectment brought against a husband, the wife cannot be let in as party defendant, on the ground that the land is hers, since no action is pending after rendition of the judgment against the husband.—*Meadows v. Goff*, Ky., 14 S. W. Rep. 535.

32. ELECTION LAWS—Ballots.—Under Rev. St. Wis. ch. 7, § 89, requiring ballots for judicial officers to be put in a separate ballot-box, the fact that the ballots of one candidate have printed on the back the word "Judiciary" does not invalidate them, under Const. art. 3, § 3, requiring that all "votes shall be given by ballot," for it is necessary that the inspectors should know which are the judiciary ballots in order that they may place them in a separate box; and whether this information is imparted by some mark on the ballot or

by the voter, the secrecy of the ballot is to that extent violated.—*State v. Barden*, Wis., 46 N. W. Rep. 899.

33. ELECTIONS AND VOTERS — Registration.—Act Pa. Jan. 30, 1874, § 10, requiring any person whose name is not registered on election day to make and produce affidavits as to certain facts, including where his residence is, "to the best of his knowledge and belief, when and where he was born," when and where the tax he is required to have paid was assessed, and when, where and to whom paid, and, if he is a naturalized person, when, where and by what court, does not violate Const. Pa. art. 8, § 7, which declares that "no elector shall be deprived of the privilege of voting by reason of his name not being registered."—*Appeal of Cusick*, Pa., 20 Atl. Rep. 574.

34. EMINENT DOMAIN — Compensation.— Defendant's railroad crossed the street which ran in front of plaintiff's lot, and, in order to adjust the grade of the street to that of the railroad track, the street had to be lowered in front of plaintiff's lot, and earth was removed therefrom, and used on defendant's road, but the track was not laid on any part of such lot. Plaintiff owned the fee to the middle of the street: *Held*, that plaintiff was entitled to the value of the part of the lot taken, and to damages for the depreciation of the lot by the change of the grade of the street and the operation of the road.—*Shealy v. Chicago, M. & N. R. Co.*, Wis., 46 N. W. Rep. 887.

35. EMINENT DOMAIN— Compensation.—Gen. St. Ky. ch. 18b, relative to the taking of property for railroad purposes, and providing that, upon payment of the damages and costs, the company shall be entitled to the use and control of the property condemned, the right of the owner to compensation does not attach until the entry of the company on the land, and, notwithstanding the judgment of the county court assessing the damages, the purpose of taking the property may be abandoned by the company without its incurring any liability beyond the costs of the proceeding.—*Manion v. Louisville, St. L. & T. Ry. Co.*, Ky., 14 S. W. Rep. 532.

36. EMINENT DOMAIN—Compensation.—Where land is condemned for public use, as for opening a street, the owner is entitled to the fair market value of the land actually taken, and special benefits to the residue of the tract cannot be set off against such value, but may be against incidental damages to the residue of the tract.—*City of Omaha v. Howell Lumber Co.*, Neb., 46 N. W. Rep. 919.

37. EMINENT DOMAIN—Value of Property Taken.—The rule in condemnation proceedings is to ascertain the value of the entire tract through which the road is to run, and then find the value of the whole tract after the appropriation of the strip necessary for the road; and the difference is the compensation to which the owner is entitled, excluding all enhancement in value resulting from the proposed improvement.—*Louisville & N. E. Co. v. Ingram*, Ky., 14 S. W. Rep. 534.

38. EQUITY—Practice.—Under Code Iowa 1873, in equitable actions, it is improper to submit questions of fact to a jury.—*Frank v. Hollands*, Iowa, 46 N. W. Rep. 979.

39. EVIDENCE—Declarations.—Where the question at issue is the lease of a business, and the owner has testified that he leased it, and no proof of any contradictory statements by him has been offered, a private letter written by him to a third person several months later in which he refers to the lease is inadmissible in corroboration of his testimony.—*Crooks v. Bunn*, Pa., 20 Atl. Rep. 529.

40. EVIDENCE — Parol.— In an action by the seller against the purchaser for the breach of a written contract, in which all the terms of the sale are explicitly set out, to buy 15,000 ounces of quinine, parol evidence is inadmissible to show that the sale was made on condition that the seller would advance the price of quinine after the sale, and announce the fact by circular to the trade.—*Engelhorn v. Reitlinger*, N. Y., 25 N. E. Rep. 297.

41. EXECUTION—Lien.—Liens acquired by judgment creditors on their debtor's property, by placing their executions in the hands of the sheriff, are not divested by the subsequent appointment of a receiver of the debtor's estate and the sale of his property under order of the court, in proceedings to which the execution creditors were not made parties, and of which they had no notice; and they have the right to levy upon and sell the property after it has passed into the hands of the purchaser at the receiver's sale.—*J. W. Dana Manuf'g Co. v. Parkhurst*, Ind., 25 N. E. Rep. 847.

42. FALSE IMPRISONMENT—Evidence.—Plaintiff with his father went to defendants' store, and said that his mother had been insulted there a few days before. Defendants told them that they were mistaken. Plaintiff then became abusive, and said he would like to thrash the man who insulted his mother. Defendants then told them that they were interfering with defendants' business, and ordered them to leave. Defendants then sent for an officer, who came and arrested them, and committed them on the charge of "breach of the peace, in using threats and inciting to riot:" *Held*, that plaintiff could not recover for false imprisonment or malicious prosecution.—*Sloan v. Schomacker*, Penn., 20 Atl. Rep. 525.

43. FRAUDULENT CONVEYANCES.—A debtor in failing circumstances may give a creditor adequate security by way of mortgage upon his personal property to secure a *bona fide* debt; but he cannot in this manner convey all his personal property, greatly in excess of sufficient security, and thus hinder and delay other creditors in collecting their claims against him, without subjecting himself to the charge of a fraudulent disposition of his property.—*Morse v. Steinrod*, Neb., 46 N. W. Rep. 922.

44. FRAUDULENT CONVEYANCES.—A transfer by the son of his interest in a drug-store to his father, the son remaining in possession, and managing the business as his own, is invalid as against the son's creditors who have no notice of such transfer.—*McIntosh v. Wilson*, Iowa, 46 N. W. Rep. 1003.

45. FRAUDULENT CONVEYANCES—Possession.—A creditor agreed to take, in part payment of his account, a team of horses, a harness, and a wagon. The property, together with other property of the debtor, was in the latter's barn upon a lot where he carried on business, and in charge of his employee, who carried the key to the barn. The purchaser did not go himself, or send any one to take possession, but had an arrangement with the seller for the use of his barn until he was ready to remove the property, and with his employee to continue to care for it. While in this situation, the property was seized under an execution, as the property of the seller: *Held*, there was no delivery, the sale was constructively fraudulent, and the purchaser could not recover the property.—*Stevens v. Gifford*, Penn., 20 Atl. Rep. 542.

46. GIFTS—Evidence.—In an action to recover the value of government bonds which plaintiff claimed were given her by the owner during her life-time, but which were claimed by defendant as residuary legatee, it is competent for defendant to give evidence that the bonds were found to be deposited in bank at the death of the owner in the owner's name and not in plaintiff's.—*Patterson v. Dushane*, Penn., 20 Atl. Rep. 538.

47. HIGHWAYS—Injunction.—Where, in a suit to enjoin the opening of a public road, a decree is rendered finding that the road has been properly established, and that the plaintiff is entitled to damages for the land taken from him, the fact that he had previously filed a conditional claim for such damages, which claim had been abandoned before the decree was rendered, is not such a recognition of the decree as would prevent him from appealing from it.—*Smith v. Gorrell*, Iowa, 46 N. W. Rep. 992.

48. HIGHWAYS—Obstruction.—Where a highway, regularly laid out and opened, has been used as such for 40

years, an adjoining owner who erects a wall within the limits of the defined and established road-bed is guilty of an unlawful obstruction, though such wall is on his property line as ascertained by a survey made after the location, opening, and user of the road.—*Commonwealth v. Marshall*, Penn., 20 Atl. Rep. 580.

49. INSURANCE—Conditions.—A condition in a fire policy that it shall not bind the company if the assured procures other insurance without the consent of the company in writing, is valid, and though there is also a stipulation in writing on the policy at the time of its delivery that the insured may get other insurance up to a specified amount, yet the condition is broken, and the policy forfeited, if he obtain other insurance beyond that amount without the consent of the company.—*Allen v. German Amer. Ins. Co.*, N. Y., 25 N. E. Rep. 309.

50. INTOXICATING LIQUORS—Sales.—On trial for maintaining a saloon the evidence showed that defendant kept a bakery and eating-house, and tended to show that intoxicating liquor was sold there: *Held*, that evidence that five barrels of bottled beer were found at defendant's residence was admissible.—*State v. Illsley*, Iowa, 46 N. W. Rep. 977.

51. JUDGMENTS—Authentication.—A certificate of the record of a foreign judgment, showing that it was rendered by a court of record which has a seal and a clerk, sufficiently shows, until the contrary appears, that it is the judgment of a court that had jurisdiction of the parties.—*Gaughran v. Gilman*, Iowa, 46 N. W. Rep. 1005.

52. JUDGMENT—Excusable Neglect.—The neglect of a party or his attorneys, under the facts as presented by this record, to inform himself of the recitals in a deed of conveyance by which he claims title, and which he offers in evidence, is not such "excusable neglect" as would warrant the court, in the exercise of the discretion conferred on it, to open a judgment under section 102, Hill's Ann. Code.—*Hicklin v. McClear*, Oregon, 24 Pac. Rep. 992.

53. JUDGMENTS—Revival.—The owner of a judgment assigned a part of it, and afterwards having taken a conveyance from the judgment debtor of the land on which it was a lien entered satisfaction of the unassigned portion. The assignee inadvertently permitted the statutory lien of the judgment to expire, and then procured an agreement signed by the assignor purporting to authorize the revival of the assigned portion against defendant in the judgment, but this agreement did not in terms authorize the entry of any judgment against the assignor who was then owner of the land, formerly subject to its lien, nor was it signed by the original defendant, and it appeared by the pleadings in a proceeding to strike out this judgment of revival thus entered that the assignor did not intend to authorize the entry of any judgment against himself: *Held*, that the agreement did not authorize such judgment and it should be struck out.—*Miller v. Miller*, Penn., 20 Atl. Rep. 565.

54. LEGACY—Interest.—The rule that interest on legacies does not commence until a year from the testator's death does not apply to a bequest of a sum in trust to pay the interest on income to the legatee for life but such interest accrues from the date of the testator's death.—*In re Flickwir's Estate*, Penn., 20 Atl. Rep. 578.

55. LIMITATION OF ACTIONS—Legatees and Distributees.—The statute of limitations runs in favor of legatees or distributees who were indebted to the testator, and is not arrested by his death; and they can claim their legacies or distributive shares free from any offsets on account of such debts, if they are barred at the time of the distribution.—*In re Light's Estate*, Penn., 20 Atl. Rep. 536.

56. MANDAMUS—County Treasurer.—After a county treasurer has gone out of office, the county supervisors cannot be compelled by *mandamus* to order him to refund money to which plaintiff was entitled, and which said treasurer while in office wrongfully paid out to a third person before the *mandamus* suit was begun.—*Eyerly v. Board of Supervisors*, Iowa, 46 N. W. Rep. 986.

57. MANDAMUS TO SCHOOL BOARDS—*Mandamus* will not lie against a school board to compel it to relocate a school-house at a particular place in the district, in the absence of any showing of abuse of discretion on their part in maintaining the school at its old location.—*Peters v. Warner*, Iowa, 46 N. W. Rep. 1001.

58. MASTER AND SERVANT—Fellow servant.—Defendant was delivering a large fly-wheel at the factory of B, plaintiff's employer, and the servants of both defendant and B were jointly engaged in unloading the wheel. Defendant's foreman called for help as the wheel was being lowered, and B's foreman ordered plaintiff to assist, and while executing this order plaintiff was caught under the wheel, and injured: *Held*, that plaintiff assumed the relation of servant to defendant, even though ordered to assist by his employer's foreman, at the request for help from defendant's foreman, and that he could not recover for the negligence of the other servants of defendant.—*Wischkam v. Richards*, Penn., 20 Atl. Rep. 532.

59. MASTER AND SERVANT—Negligence.—The single fact that a mill corporation furnishes a circular saw operator in its employ with some uneven and knotty timber, in sawing which he is killed, does not constitute negligence on the part of the corporation, unless it knew, or could have known by the exercise of reasonable care, that the timber was dangerous to be used.—*Hooper v. Snead & Co.'s Iron-Works*, Ky., 14 S. W. Rep. 542.

60. MASTER AND SERVANT—Safe Appliances.—In an action for the wrongful death of a brakeman, it appeared that defendant was in the habit of transferring the bodies of broad-guage cars to its narrow-guage trucks, for the purpose of transporting them over its line. The usual appliances were used to make the broad-guage cars secure on the narrow-guage trucks, and plaintiff's intestate had formerly assisted in transferring such cars, and knew of the risks attendant upon running them on the narrow-gauge track. While riding on the top of a car that had been thus transferred, the blocking that held it to the trucks became loose and it turned over, causing the death: *Held*, that there could be no recovery, for, though the service was dangerous, plaintiff accepted it fully aware of all its risks, and no negligence was shown.—*Titus v. Bradford, B. & K. R. Co.*, Penn., 20 Atl. Rep. 577.

61. MORTGAGE—Foreclosure.—Appellant and appellee bought land subject to a mortgage which appellant assumed. They then sold the land, and their vendee gave appellee a second mortgage on part of the land: *Held*, that in a suit to foreclose the first mortgage appellee could by cross-petition obtain foreclosure of the second mortgage, and judgment against appellant for the amount he might have to pay to protect himself against the first mortgage.—*Montpelier Sav. Bank & Trust Co. v. Arnold*, Iowa, 46 N. W. Rep. 982.

62. MORTGAGE—Payment.—The owner of two notes secured by the same mortgage assigned one of them before maturity to defendant, and the other after maturity to plaintiff. Between the two assignments he took part of the mortgaged property, worth more than the second note, in an exchange: *Held*, that the second note was thereby extinguished.—*Massachusetts Loan & Trust Co. v. Moulton*, Iowa, 46 N. W. Rep. 978.

63. MUNICIPAL CORPORATIONS.—The fact that a civil engineer, employed by the city for several years, has charged $5 per day for his services on common surveying, does not establish an implied contract for compensation at the same rate for preparing drawings and specifications for a cedar-block pavement—a work requiring a higher degree of care and skill than the work formerly performed by him.—*Brauns v. City of Green Bay*, Wis., 46 N. W. Rep. 889.

64. MUNICIPAL CORPORATIONS—Officers.—The charter of the city of Detroit provides for the designation by the common council of the aldermen in each ward to the election districts therein, and also for the appoint-

ment of qualified electors in each district who, with the aldermen, shall act as chairmen, respectively, of the boards of inspectors and of registration in these districts. These appointments must be made at least two weeks previous to a general election. At the last meeting of the council, prior to a general election, when these appointments could be lawfully made, the minority faction of the council withdrew, and the majority, though not constituting a quorum, proceeded to make the appointments: *Held*, that the acts of the officers thus appointed were valid, as they were officers *de facto*, but that the council would be compelled by *mandamus* to immediately designate, at a lawful meeting, the chairmen of the different boards of inspectors to take the place of those illegally appointed at the former meeting.—*Dingwall v. Common Council*, Mich., 46 N. W. Rep. 938.

65. MUNICIPAL ORDINANCES — Regulations.—An ordinance which, among other things, prohibits the construction of "any jut or bulk window" projecting into the street more than 28 inches, is a reasonable regulation, and, being general in its application, is valid.—*Livingston v. Wolf*, Pa., 20 Atl. Rep. 551.

66. MUTUAL BENEFIT INSURANCE— Waiver.—The by-laws of a mutual beneficiary association organized under St. Mass. 1877, ch. 204, § 1 (Pub. St. ch. 115, §§ 2, 8), provided that only male Roman Catholics between the ages of 20 and 51 years were eligible to membership. The application of decedent, which designated plaintiff as his beneficiary, described him as about 49 years old, when in fact he was over 51 years old: *Held*, that even if the officers of the corporation attempted to waive the condition as to age they could not to so.—*McCoy v. Roman Catholic Mut. Ins. Co.*, Mass., 25 N. E. Rep. 289.

67. NEGLIGENCE.—It is negligence for a switchman to ride through a freight-yard sitting on the cow catcher of a regular locomotive, temporarily used in switching work, and there can be no recovery for his death against the owner of a team with which the locomotive collided while he was so riding.—*Glover v. Scotten*, Mich., 46 N. W. Rep. 936.

68. NEGLIGENCE—Pleading.—In an action for injuries to the person and property of plaintiff, a general motion for a bill of particulars is properly denied.—*City of Plymouth v. Fields*, Ind., 25 N. E. Rep. 346.

69. NEW TRIAL—Costs.—A motion for a new trial was granted on condition that the moving party pay the costs by a given time. The costs were not actually paid at that time, but the clerk of the court gave a receipt for the amount. It did not appear that the clerk was not ready to pay the costs to the party entitled thereto on demand: *Held*, that it was proper to refuse to render judgment on the verdict.—*First Nat. Bank v. Brown*, Iowa, 46 N. W. Rep. 995.

70. NUISANCE—Damages.—A railroad company having so constructed a ditch near a dwelling that rain-water was collected, and became stagnant, and caused sickness, an occupant of the house, though a tenant only, has an action for the nuisance, in which he may recover for the injury to his own health, and the loss of services of his minor children, and expenses necessarily incurred in sickness.—*Lockett v. Ft. Worth & R. G. R. Co.*, Tex., 14 S. W. Rep. 564.

71. PARTNERSHIP—Accounting.—In an action by partners against copartners to recover defendants' proportionate share of the partnership indebtedness which plaintiffs had paid, it is no defense that the action involves an accounting between partners when it appears that, in a prior suit, to which all the partners were parties, the proportionate liability of each partner was determined.—*Logan v. Trayser*, Wis., 46 N. W. Rep. 877.

72. PARTNERSHIP—Pleading.—In an action against a partnership for a breach of warranty, it is competent to prove that one member of the partnership made the representations and warranty for the firm that induced the sale, although the pleading alleges that the warranty was made by the firm. A partnership is bound by the representations and warranties made in the sale of its goods by a member thereof.—*Eldridge v. Hargreaves*, Neb., 46 N. W. Rep. 923.

73. PARTNERSHIP—Warrant of Attorney.—A warrant of attorney signed in the firm name by the majority of the partners is sufficient to authorize the use of the firm name in a suit upon a contract made by the firm.—*Clark v. Slate Valley R. Co.*, Pa., 20 Atl. Rep. 562.

74. PARTY-WALLS—Evidence.—Where a wall between adjoining houses has for more than 21 years been used by their respective owners, it will be regarded as a party-wall, whether equally on the lot of each or not, and one owner will not be liable in trespass for using it on rebuilding or for tearing it down, and replacing it when condemned by the building inspector.—*McVey v. Durkin*, Pa., 20 Atl. Rep. 541.

75. PLEADING—Abatement.—An answer of a former action pending *held* not to state or show identity of cause of action in the two actions.—*Wilson v. St. Paul, M. & M. Ry. Co.*, Minn., 46 N. W. Rep. 909.

76. PLEADING—Amendment.—An action on the official bond of the clerk of a circuit court was commenced in the name of an individual as plaintiff. In the course of the trial, the court allowed the complaint to be amended so as to make the State, on the relation of such individual, the plaintiff: *Held*, that the amendment cured the infirmity in the complaint, and, under Rev. St. Ind. 1881, § 396, was properly allowed in the absence of any showing that defendants were prejudiced thereby.—*Meyer v. State*, Ind., 25 N. E. Rep. 351.

77. PLEADING—Names.—Where a party whose Christian name was Oscar R. was in the habit of signing checks, and doing business at banks and other places, by the initials of his Christian name, these initials will be treated as his business name, and a judgment recovered against him by that name is not subject to collateral attack.—*Oakley v. Pegler*, Neb., 46 N. W. Rep. 920.

78. POWERS—Perpetuities.—Testator devised lands in trust, to pay the net income to his daughter for life, and to convey the fee to the appointees of her will, or, failing such appointment, to her children: *Held* that, since the power must be exercised during the life of the daughter, and hence within the limit of a life in being, and 21 years thereafter, it does not violate the rule against perpetuities.—*Appeal of Appleton*, Pa., 20 Atl. Rep. 521.

79. PRACTICE — Verbal Stipulations by Attorneys.—Under Code Iowa, § 213, subd. 2, which provides that no evidence of an agreement by an attorney relative to the conduct of a case shall be received, except the statement of the attorney himself, his written agreement filed with the clerk, or any entry thereof on the records of the court, a verbal stipulation by an attorney not to call the case for trial without personal notice to the adverse party cannot be proved by the adverse party or his attorney, but only by the stipulating attorney's own statement.—*Council Bluffs, L. & T. Co. v. Jennings*, Iowa, 46 N. W. Rep. 1006.

80. PRINCIPAL AND AGENT—Misrepresentations.—The legal owner of pine lands, who has acted on a contract for cutting the pine executed in his name by one of the equitable owners, and who has received the logs cut thereunder, and made advances to the contractor as provided in the contract, thereby adopts and ratifies it, and will not be afterwards heard to say that the equitable owner was not his agent for the purpose of contracting for the cutting of the pine, with authority to make representations both as to its quantity and quality, and as to the suitability of the land for logging purposes.—*Busch v. Wilcox*, Mich., 46 N. W. Rep. 940.

81. PUBLIC LANDS—Duplicate Certificate.—The commissioner of the general land-office has power to issue a duplicate land certificate, upon satisfactory proof of the loss of the original, and, under Rev. St. Tex. art. 3885, the duplicate entitles the owner "to the same quantity of land as was conferred by the original:" *Held*, that where no original ever existed, and a pretended duplicate was procured by fraud, an innocent purchaser thereof gets no legal or equitable title to

lands located under it.—*Gunter v. Meade*, Tex., 14 S. W. Rep. 562.

82. PUBLIC LANDS—Patent—Evidence.—The execution and delivery by the State of a patent to lands is an admission that all previous proceedings have been had, and all formalities complied with; and it is therefore admissible, and is *prima facie* evidence, showing title in the patentee or his assigns, without prior proof of a survey.—*Bushey v. South Mountain M. & I. Co.*, Penn., 20 Atl. Rep. 549.

83. PUBLIC LANDS—State Grants.—Under Act Tex. Nov. 29, 1871, (Pasch. Dig. art. 7098), requiring all field-notes withdrawn from the land-office to be returned within 12 months from the passage of the act, under a penalty of a forfeiture of the location, it is sufficient to file in the land-office a certified copy of the field notes taken from the surveyor's books.—*Hill v. Kerr*, Tex., 14 S. W. Rep. 566.

84. QUIETING TITLE—Action by Creditor.—A creditor of an estate cannot bring suit to remove a cloud from the title of land belonging to the estate, except by leave of court, after refusal of the administrator to bring suit.—*Marshall v. Blass*, Mich., 46 N. W. Rep. 947.

85. QUIETING TITLE.—One who purchases a disputed land-title on a speculation, under an agreement that he is to pay nothing unless he succeeds in holding the land, and who thereafter obtains possession thereof during the temporary absence of the person claiming to be owner, is in no position to ask the aid of a court of equity to quiet his title, and assist him in his wrongful holding.—*Rubert v. Brayton*, Mich., 46 N. W. Rep. 935.

86. RAILROAD COMPANIES—Fires.—In an action for damages caused by a fire which escaped from one of defendant's trains, and ignited upon defendant's right of way, and which spread over adjoining land, and finally destroyed plaintiff's property: *Held*, that whether the fire started by the defendant was the proximate cause of the injury complained of, or whether such injury was the result of another and independent cause, where, under the evidence, questions of fact for the jury, and the court did not err in submitting such questions to the jury, with proper directions as to the law. This is true where the wind shifts or increases in violence after the fire starts, and before the damage is done.—*Gram v. Northern Pac. R. Co.*, N. Dak., 46 N. W. Rep. 972.

87. RAILROAD COMPANIES—Foreclosure.—Where a railroad is sold under foreclosure, and a new corporation acquires all the properties of the old except a leased line, which was not included in the property transferred, but of which, nevertheless, the new company actually takes possession, and operates, the new company must be regarded as the assignee of the lease, and, by virtue of its possession, is liable for the rent, which in this case was the interest on first mortgage bonds, which the original lessee had agreed to pay, and for which the succeeding company is liable as long as it occupies the road.—*Frank v. Erie & G. V. R. Co.*, N. Y., 25 N. E. Rep. 332.

88. RAILROAD COMPANIES—Negligence.—Where, in an action against a railroad company for negligently causing a house to be burned, title thereto is proved by parol without objection by defendant, it cannot, after all the evidence is in, raise the question as to the competency of such proof by a motion to dismiss because title was not proved.—*Fish v. Chicago, R. I. & P. Ry. Co.*, Iowa, 46 N. W. Rep. 998.

89. RAILROAD COMPANIES—Regulations.—The defendant has a rule requiring persons passing through its gates, for the purpose of taking trains, to exhibit their tickets to the gate-keeper, and have them punched by him; also one providing that no passenger shall be allowed to board any train while in motion: *Held*, that these rules are reasonable, and that all persons intending to take trains, and knowing of, and having a reasonable opportunity to do so, are bound to comply with them.—*Dickerman v. St. Paul Union Depot Co.*, Minn., 46 N. W. Rep. 907.

90. RAILROAD COMPANIES—Right of Way.—A railroad company which condemns a right of way under its charter, in the absence of a special provision to the contrary, takes the land for perpetual use for railroad purposes; and when the company is consolidated with, and merged into another company, which succeeds to all its rights and franchises, and continuously operates the road, the right of way does not determine and revert to the land-owner at the end of the time for which the original company was chartered.—*Miner v. New York Cent. & H. R. R. Co.*, N. Y., 25 N. E. Rep. 330.

91. RAILROAD COMPANY—Street Railway.—A street railway company, incorporated under Act Pa. May 14, 1889, (P. L. 211), providing for the incorporation of such companies, must under Const. Pa. art. 17, § 9, obtain the consent of the city authorities to use the street of the city in which it is to be operated, and not having procured such consent it has no standing in a court of equity to enjoin a company subsequently organized under the same act, and which has obtained the consent of the city council, from occupying the same streets designated in plaintiff's charter as the route intended to be used by it.—*Appeal of Larimer & L. St. Ry. Co.*, Penn., 20 Atl. Rep. 870.

92. REAL ESTATE AGENT.—The owner of a lot who has authorized an agent to sell it for $5,500 net is not bound by the agent's sale thereof for a gross sum of $5,500, made nine months after receiving his authority, without consulting the owner, during which time the lot has increased in value, and the owner has paid the taxes.—*Wanveyler v. Martin*, Wis., 46 N. W. Rep. 890.

93. SALE—Warranty.—A sale of a bull by defendant to plaintiff was evidenced by a writing which, after stating at length the bull's pedigree, concluded: "I have this day sold the above-named bull * * * to * * * [plaintiff.] * * * I hereby certify the above pedigree to be true:" *Held* that, as the contract evidencing the sale contained an express warranty other than the law implied, an express warranty against sterility could not be proved by parol.—*McQuaid v. Ross*, Wis., 46 N. W. Rep. 892.

94. SALE—When Title Passes.—Ordinarily, where there is a sale of goods by number, weight, or measure, at so much a piece, a pound, a cord, or a bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, weighed, or measured before the price to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor.—*Rosenthal v. Kahn*, Oreg., 24 Pac. Rep. 989.

95. SCHOOLS AND SCHOOL DISTRICTS.—A complaint which alleges that two adjoining townships had organized themselves into a joint free high-school district; that subsequently one of the townships was divided; that the newly created township still continued a part of the joint school district; and that its officers had neglected and refused to perform their official duty in the matter of levying and collecting its proportionate share of the taxes for the support of the high school—does not present a case calling for damages, but one, if at all, calling for the enforcement of an official duty; which can be compelled only by *mandamus*.—*Joint Free High-School District v. Town of Green Grove*, Wis., 46 N. W. Rep. 896.

96. SCHOOLS AND SCHOOL DISTRICTS—Theft of School Fund.—The fact that a school district treasurer has lost the public funds by burglary, although without his own fault, constitutes no defense to an action on his official bond for the failure to pay over to his successor the money received and not disbursed by him.—*Board of Education v. Jewell*, Minn., 46 N. W. Rep. 914.

97. SET-OFF—Claims not Due.—Upon an assignment for the benefit of creditors, a bank cannot set off a deposit to the credit of the assignor against a note held by it against him, but not due at the time of the assignment.—*Oatman v. Batavian Bank*, Wis., 46 N. W. Rep. 881.

98. SET-OFF TO JUDGMENTS.—In an action on a judg-

ment founded on a note and an account, defendant may plead in set-off items which accrued previous to the commencement of the original suit, but which were not involved in such suit.—*Fiske v. Steele*, Mass., 25 N. E. Rep. 291.

99. SLANDER — Evidence. — The following words: "What are you doing with that nine-dollar black-mailer here?" spoken of a woman, are actionable *per se*.—*Hess v. Sparks*, Kan., 24 Pac. Rep. 979.

100. TAXATION—Corporate Indebtedness.—Though a corporation is in the hands of a receiver appointed by the United States court, it is the duty of its treasurer, who is also the treasurer of the receiver, to assess the tax of three mills on its bonded indebtedness, as required by Act Pa. June 30, 1885, and, the receiver having paid the interest in full without deducting the tax, the company is liable for the same.—*Commonwealth v. Philadelphia & M. C. & I. Co.*, Penn., 20 Atl. Rep. 531.

101. TAX-TITLES—Limitation of Actions.—Failure to carry forward the delinquent taxes of previous years, as required by law, renders a tax-sale only voidable, so that the right to set it aside may become barred by the statute of limitations.—*Lawrence v. Hormick*, Iowa, 46 N. W. Rep. 987.

102. TOWN — Defective Highways.— Rev. St. Wis. § 1339, which requires a notice of an injury resulting from a defective township highway to be served on a member of the town board, but which does not prescribe the mode of service, is sufficiently complied with by the delivery of the notice to a third person, with directions to serve it on the chairman of the board, and a showing that the notice actually came into his possession within the prescribed time.—*Welting v. Town of Milston*, Wis., 46 N. W. Rep. 879.

103. TOWN COMPANY—Corporate Existence.—The Palmetto Town Company was created by an act of the legislature, approved Feb. 5, 1857, which failed to provide the duration of its existence: *Held*, that it ceased to exist 10 years after its creation, and that it was thereafter powerless to execute a conveyance of real estate.—*Marysville Investment Co. v. Munson*, Kan., 24 Pac. Rep. 977.

104. TRIAL—Jury—Contract.—Where the rights of the parties depend upon an agreement between them, and such agreement can only be gathered from statements and expressions used by them in letters and conversations which are apparently conflicting and inconsistent with each other, it is the duty of the jury and not of the court to find from all the evidence what the agreement really was.—*Rauber v. Sundback*, S. Dak., 46 N. W. Rep. 927.

105. TRIAL—Special Verdicts.—Where the jury are directed to find a special verdict, they should not be instructed that if the special questions are answered in one way then the answers will be consistent with a general verdict for one party, and if answered in another they will be consistent with a general verdict for the other party; for the object of such special verdicts is to get the unbiased decision of the jury on some material question of fact, without any reference in their minds as to how the finding will effect the general verdict.—*Ryan v. Rockford Ins. Co.*, Wis., 46 N. W. Rep. 885.

106. TRIAL BY REFEREE—Bill of Exceptions.—In a case tried before a referee it is his duty to sign any true exceptions taken to any order or decision made by him in the case. Such bill of exceptions is not to be signed by the judge.—*State v. Gaslin*, Neb., 46 N. W. Rep. 917.

107. VENDOR AND VENDEE.—Where vendees of land under a title-bond agree to let judgment go against them for the price, in consideration of the dissolution of an injunction preventing them from cutting timber on the land, the presumption is that they knew the condition of the title, and agreed to receive it in its then condition; and the agreement will be enforced against them, unless they prove fraud or mistake in its execution.—*McDaniel v. Evans*, Ky., 14 S. W. Rep. 541.

108. WATER AND WATER-COURSES.—A land owner who permits the water used in irrigating his fields to percolate through a ditch, and saturate his neighbor's land, is liable for the damages, and may be restrained from continuing the injury.—*Parker v. Larsen*, Cal., 24 Pac. Rep. 989.

109. WILL—Construction.—A bequest by a testator of "all the personal property which I may have at my death" covers the proceeds of real estate subsequently disposed of by the testator.—*Simmons v. Beazel*, Ind., 25 N. E. Rep. 344.

110. WILL—Construction.—A devise to the testator's daughter, but if she "die without issue" then to another daughter, imports an indefinite failure of issue, which renders the limitation over void, and carries the fee to the first taker.—*Hackney v. Tracy*, Pa., 20 Atl. Rep. 560.

111. WILLS—Construction.—A will provided that the estate should be kept together till the youngest child came of age, and that it should then be equally divided among those then living, and if any of them should die without heirs his share to be equally divided among the others: *Held*, that this last clause referred to the death of a child before the division took place, and that after the estate was divided each took an absolute title to his share.—*Wilson v. Bryan*, Ky., 14 S. W. Rep. 533.

112. WILLS—Construction.—Testator gave his whole estate to P in trust, to be enjoyed by his wife during her life, and by his daughter afterwards until she reached the age of 25, when she was to have the whole estate absolutely, but provided that, in case his wife outlived his daughter, then, at his wife's death, two-thirds of the whole estate was to be divided between his father and sisters then living, and the remaining third to go to said P absolutely: *Held*, that the daughter took a vested interest, subject to be divested and fall back into the body of the estate if she died before her mother.—*In re Batione's Estate*, Penn., 20 Atl. Rep. 572.

113. WILLS—Expenses of Litigation.—Where a disinherited daughter breaks the will of her father, she is not entitled to have her attorneys' fees, and other expenses incurred in the litigation, repaid out of the estate.—*Taylor v. Minor*, Ky., 14 S. W. Rep. 544.

114. WILLS—Joint Execution.—A brother and sister, owning separate properties, made a will together, which read as follows: "I, Benjamin Cawley, should I be the first to die, give, devise, and bequeath to the survivor of us all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivors," etc., and directed that, at the expiration of the life estate, the residue shall be divided into nine parts, "three of which parts I give and bequeath," etc., the singular number being used through the whole instrument: *Held*, that the instrument was the separate will of each, and the survivor, as to her property, had a right to make a new will containing a different disposition thereof.—*In re Cawley's Estate*, Penn., 20 Atl., Rep. 567.

115. WILL—Probate.—Civil Code Ky. § 25, relating to parties to actions, provides that "if the question involve a common or general interest of many persons, or if the parties be numerous, and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue for the benefit of all:" *Held*, that where at the probating of a will, it appeared that the testator, who died childless at the age of 86, had 10 brothers and sisters, but the number and names of their children were not given, it was proper to allow the descendants of one brother to contest the proceeding for the benefit of all.—*Randolph v. Lamplin*, Ky., 14 S. W. Rep. 583.

116. WITNESS—Attendance.—Code Iowa, § 4385, which provides that, on change of venue in criminal cases, the accused shall give bond for his appearance, and the court or judge may require witnesses for the State to enter into "cognizance" for their appearance, does not authorize the judge to require the witness to furnish bond with sureties, and in default thereof to be kept in custody.—*Comfort v. Kittle*, Iowa, 46 N. W. Rep. 988.